UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the matter of:

SLEEPY'S, LLC

Employer,

and

United Food and Commercial Workers Union, Local 919

Petitioner.

Case No. 34-RC-2317

EMPLOYER'S REQUEST FOR SPECIAL PERMISSION TO APPEAL THE ACTING REGIONAL DIRECTOR'S DIRECTION OF A MAIL BALLOT ELECTION

Sleepy's, LLC ("Sleepy's" or the "Employer") hereby requests special permission to appeal the Acting Regional Director's June 25, 2009 direction of a mail ballot election (Attached at Tab A) and the Acting Regional Director's July 1, 2009 correspondence denying the Employer's motion for reconsideration and ordering the **mailing out of the ballots on July 13, 2009** (Attached at Tab B). The Employer's June 25, 2009 Motion to Stay Further Processing of Case 34-RC-2317 and Holding of an Election is pending before the Board.

It is respectfully requested that the Board review the Region's direction of a mail ballot election.

It is the Board's longstanding policy that representation elections should, as a general rule, be conducted manually. The facts in this case do not satisfy the criteria for directing a mail ballot election. NLRB Representation Casehandling Manual, Section 11301.2. The Region's

stated grounds for directing a mail ballot election are unsound and are an abuse of discretion. Such grounds include: (1) the eligible voters are scattered over a wide geographic area, (2) only 50% of the eligible voters work on a given day, and (3) the voting locations offered by the Employer are not sufficient given the travel distances and their work schedules.

First, the eligible voters are not "scattered" because of their job duties. This is not an over-the-road trucking unit or the like. Rather, all eligible voters work or live within a small geographic area. All eligible voters live or work within 16 miles of a retail store that can be used as a manual voting location. As the eligible voters routinely work in many stores, the few miles of travel to a voting location is reasonable, feasible and clearly not an undue burden on the eligible voters as they are accustomed to traveling between stores. The Employer's offer to use as many of its retail stores for voting locations was summarily rejected by the Region. Moreover, the eligible voters are not "scattered" in the sense that their work schedules vary significantly. They all work the same work hours commencing at 10:00 a.m. Therefore, they can easily be at common voting locations at a common time. Thus, the Region's contention that the overwhelming majority of eligible voters will have to vote prior to their starting time, or on their day off from work, at a location miles away from their designated store is simply unfounded.

Second, more than 50% of the workforce is scheduled to work each day and all live centrally to the proposed voting locations. Certainly, the Employer can accommodate all eligible voters by opening the polls at 8:00 a.m., two hours before the stores open, to ensure that they can vote before or during their shift and to avoid any problems associated with rush-hour traffic.

Third, there is no strike, lockout or picketing in progress.

Finally, as noted in the Casehandling Manual, the desire of the parties must be considered. Here, the Employer has expressed a direct desire to follow the Board's mandate for

a manual election. The Employer respectfully submits that the factual grounds do not exist in this case to set aside the Board's policy.

For all the above reasons, the Employer respectfully requests that the Board grant its request for special permission to appeal the Acting Regional Director's direction of a mail ballot election and its mailing of the ballots on July 13, 2009.

Respectfully submitted,

LITTLER MENDELSON, PC One Newark Center, 8th Floor Newark, New Jersey 07102 Attorneys for Sleepy's, LLC

Alan I. Model / KSK

Dated: July 7, 2009

CERTIFICATE OF SERVICE

I, Alan I. Model, hereby certify that the instant Motion has been served this day FedEx and via electronic filing upon:

Executive Secretary National Labor Relations Board 1099 14th Street N.W. Washington, DC 20570

and via fax and FedEx upon Region 34:

Jonathan Kreisberg, Regional Director National Labor Relations Board, Region 34 280 Trumbull Street, 21st Floor Hartford, CT 06103

and via fax and FedEx upon the Petitioner:

William Gagne, Esq. J. William Gagne, Jr. and Associates 970 Farmington Avenue, Suite 207 West Hartford, CT 06107

Man Model / KSIC

Dated: July 7, 2009

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EXHIBIT A



United States Government

NATIONAL LABOR RELATIONS BOARD

Region 34 280 Trumbull Street, 21st Floor Hartford, CT 06103-3503

Telephone (860) 240-3522 Fax (860) 240-3564 www.nlrb.gov

June 25, 2009

VIA FACSIMILE

Alan I. Model, Esq. Littler Mendelson, PC One Newark Center, 8th Floor Newark, NJ 07102

RE:

SLEEPY'S INC. Case 34-RC-2317

Dear Mr. Model:

This is in response to your June 23, 2009 e-mail, as well as your June 24, 2009 telephonic communication with Assistant Regional Director John Cotter, with regard to my determination to conduct a mail ballot election in the above-captioned matter pursuant to Section 11301.2 of the Board's Casehandling Manual.

More particularly. I have determined that conducting the election by mail ballot, as requested by the Petitioner, would enhance the voting opportunity for all eligible voters. San Diego Gas & Electric, 325 NLRB 1143 (1998). In this regard, I note that the 77 voters on the Excelsior list submitted by the Employer are "scattered" over a wide geographic area, inasmuch as they are assigned to 32 separate stores on any given day, that such stores are separated by distances of as much as 60 miles, and that the voters reside throughout the western half of Connecticut, as well in New York. Massachusetts, and Rhode Island. Further, although the employees all have the same hourly schedule at each store, only one employee is generally assigned to each store. and approximately half of all the employees are not assigned to work at any store on any given day. Thus, a manually conducted election limited to several stores, as you seek, would result in the overwhelming majority of the eligible voters having to vote before their starting time at a location miles away from their designated store, or on their day off from work. Such an election would clearly not enhance the voting opportunity for all eligible voters. See Odebrecht Contractors of Florida, Inc., 326 NLRB 33 (1998) (Board affirmed direction of mail ballot election where significant number of eligible voters would have to travel to vote at any voting location); M & N Mail Service, 326 NLRB 451 (1998)(Board affirmed direction of mail ballot election where staggered work schedules resulted in 15% of unit not being scheduled to work during any potential twoday voting period); GPS Terminal Services, Inc., 326 NLRB 839 (1998)(Board affirmed direction of mail ballot election where significant proportion of unit employees would be unavailable at employer's premises for manually conducted election).

I also note that the eligible voters are all sales professionals who would have no problem reading and understanding the mail ballot, and that the *Excelsior* list submitted by the Employer reveals that all eligible voters have residential addresses to which the ballots can be mailed. Finally, your suggestion to expand the number of voting locations beyond the three locations you initially proposed would be contrary to the efficient use of the Agency's resources, as it would require the assignment and travel of many Board agents over long distances to accommodate a relatively limited number of voters.

Accordingly, I have determined that a mail ballot election will be conducted in the above-captioned matter.

Very truly yours,

Jonathan B. Kreisberg

Regional Director

JBK:lc

EXHIBIT B



United States Government

NATIONAL LABOR RELATIONS BOARD

Region 34 280 Trumbuli Street, 21st Floor Hartford, CT 06103-3599

July 1, 2009

Alan I. Model, Esquire Littler Mendelson, P.C. One Newark Center, 8th Floor Newark, NJ 07102

RE:

SLEEPY'S INC.

Case No. 34-RC-2317

Dear Mr. Model:

This is in response to your letter dated June 26 to Regional Director Kreisberg requesting that, if a mail ballot election is conducted, the ballots be mailed out on July 13 rather than July 17, so as to "provide additional time for the Region to ensure the accuracy of the voting list and the timely receipt of the ballots by all eligible voters". With regard to the voting list, the Region sees no reason why any inaccuracies in the voting list (such as the inadvertent inclusion of district managers) cannot be corrected by July 13. With regard to the time needed for voters to receive and return the ballots, this is not affected by the mailing date as the Region would provide the same amount of time for return of the ballots regardless of the mailing date. Therefore, the Region believes that no valid basis for delaying the election process has been provided. Accordingly, absent a contrary directive by the Board, the Region will proceed with mailing out the ballots on Monday, July 13, 2009. The ballots will be due back in the Regional office on July 29, 2009, which should provide more than sufficient time for the voters to mark and return their ballots. The ballots will be opened, mingled and counted at the Regional Office at 11 am on Thursday July 30, 2009.

If you have any questions regarding the mechanics of the mail ballot procedures you should contact Ms. Emirzian, the agent handling the election, at (860)240-3006.

Very truly yours,

John S. Cotter

Acting Regional Director

JSC:mc